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ABSTRACT

An annotated bibliography of 11 publications on teacher tenure and teacher dismissal focuses on the responsibility of school policymakers and administrators to establish clear employment policies and maintain teacher evaluation records. Citing numerous court decisions, Joseph Beckham examines tenure, employment qualifications, contractual obligations, and discipline. Edwin Bridges discusses the legal barriers to dismissing tenured teachers and provides an 8-part organizational approach to managing incompetent teachers. Ernest Brown reviews reasons for the growing sentiment against tenure and advises legislators to consider the consequences if it is abolished. Nelda Cambron-McCabe advises school officials to be familiar with due process principles and to apply them in rendering adverse employment decisions. Christaine Citron concludes that if the legal issues discussed in her essay are considered in the policy-making process, reform that aims to improve teacher quality will not be impeded. James Gross and Thomas Knight report on the tenure decision process in New York State. Explanations and examples of "good cause" for teacher dismissal are offered by David Larson. Bruce MacDonald outlines the important actions that school boards must take prior to and during a hearing on a teacher's incompetency. Two articles by Robert Phay deal with nonreappointment decisions that concern "average" or "satisfactory" probationary teachers. The bibliography concludes with an overview of the law concerning reduction in force. (MLF)

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THE BEST OF

ON EDUCATIONAL MANAGEMENT

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Teacher Tenure and Dismissal

1 **Beckham, Joseph**. "Critical Elements of the Employment Relationship." In Beckham, Joseph, and Zirkel, Perry A., eds. *Legal Issues in Public School Employment*. Bloomington, IN: Phi Delta Kappa, 1983. Pp. 1-21. ED 245 372.

"The intent of tenure statutes," says Beckham, a legal scholar, "is to compel procedural due process in dismissal or other adverse employment actions and thus to protect competent professional staff from unjust or arbitrary employment decisions." Tenured status is the most substantial property right in employment that state statute or school board policy can convey to the public school employee. The security conferred by tenure is not absolute, as court decisions related to dismissal for cause and reduction in force make surpassingly clear. Nevertheless, "the requirement that the school board carry the initial burden to provide sufficient evidence to warrant an adverse employment decision" is a significant benefit for the teacher.

Citing numerous court decisions, Beckham examines tenure, employment qualifications, contractual obligations, and discipline. He highlights such legal issues as the probationary period, the tenure eligibility of administrators (and other nonteaching professional staff), the acquisition of tenure by default or acquiescence, and the waiver of tenure rights.

Courts are reluctant to intervene in the employment policies of school boards unless the employment practice of the board exceeds the scope of delegated constitutional or statutory authority or is arbitrary or capricious. "Judges will insist that public school officials be guided by principles of fairness, reasonableness, and good faith in dealing with public school employees," concludes Beckham.

2 **Bridges, Edwin M., with the assistance of Groves, Barry**. *Managing the Incompetent Teacher*. Eugene, OR: ERIC Clearinghouse on Educational Management, and Stanford, CA: Institute for Research on Educational Finance and Governance, 1984. 81 pages. ED 245 296.

Thirteen consecutive years of Gallup Polls of public school parents have identified teacher incompetence as one of the biggest problems facing the public schools. Moreover, surveys of school administrators show teacher incompetence to be the third most serious problem they face. Yet Bridges' research has found that dismissal of tenured teachers for incompetence remains "a relatively rare occurrence."

It is not surprising, therefore, that four different Gallup surveys between 1970 and 1977 showed a majority of parents opposing teacher tenure, and yet another survey in 1972 showed 86 percent of the nation's school administrators wanting tenure reformed or abolished.

At least three interrelated problems account for the prevalence and seriousness of incompetent performance in the classroom: (1) legal barriers to dismissing tenured teachers; (2) technical problems in measuring teacher effectiveness; and (3) human obstacles such as the willingness and the ability of supervisors to engage in teacher evaluation, remediation, and dismissal.

In addressing the problem of legal barriers, superintendents need to be aware not only of the procedural due process rights of the tenured teacher (usually enumerated in the state education code) but also of the possibility that the dismissal decision may not be upheld by the adjudicator. "Court judges," say Bridges and Groves, "are somewhat less supportive of teacher dismissal decisions than commissions on professional competence....Hearing officers render the least favorable decisions."

Technical barriers often result from lack of legal clarification of "incompetence." Whereas state legislatures list incompetence as one of several legal causes for dismissing tenured teachers, only two states—Alaska and Tennessee—have attempted to define the term. Judges seldom specify evaluation standards, and only a few state boards of education or state statutes specify criteria for evaluation.

To assist superintendents in the development of their own districts' "reasonable and appropriate definition of incompetence" and to deal effectively with the human problems of supervision, the authors devote the majority of their book to an eight-part organizational approach to managing incompetent teachers.

3 **Brown, Ernest L**. "The Teacher Tenure Battle: Incompetency versus Job Security." *Clearing House*, 56, 2 (October 1982), pp. 53-55. EJ 269 778.

Brown reviews reasons for the growing sentiment against tenure and advises legislators to consider the consequences if it is abolished. As he points out, "Tenure guarantees employment indefinitely following the completion of a probationary period." Once tenured, "a teacher can be removed only for definite causes specified in the law and only if specified procedures are followed."

Opponents of tenure argue that it is impossible to prevent incompetent teachers from gaining permanent employment under the present system. On the other hand, proponents contend that the

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problem of incompetent teachers is not inherent in the concept of tenure; rather, it is the result of administrators ill preparing cases for dismissal. Policy-makers, Brown observes, must choose sides in the tenure battle.

The fact is that tenure laws and strong teacher unions have given teachers enviable job security. In spite of the public's perception that "the teaching ranks are filled with incompetents," only rarely are teachers dismissed for incompetency or any other "good cause." But before policy-makers abolish tenure laws by legislative action, Brown urges them to consider some of the costs of such a strategy and weigh those costs against their constituents' disapproval of the present system.

Statutory changes in tenure laws would have broad repercussions. Brown predicts that such changes would precipitate a teacher shortage ("many teachers, it has been said, are low risk takers"). During the ensuing shortage, administrators would be forced to reassign teachers to classrooms for which they are unsuited, thereby increasing the incidence of incompetence. Moreover, "courts have decided that a continuing contract is a vested right and cannot be taken away without compensation," so the state's assumption of the cost of purchasing continuing contracts must also be taken into account.

4 **Cambron-McCabe, Nelda H.** "Procedural Due Process." In Beckham, Joseph, and Zirkel, Perry A., eds. *Legal Issues in Public School Employment*. Bloomington, IN: Phi Delta Kappa, 1983. Pp. 78-97. ED 245 375.

When public school officials dismiss teachers, the adequacy of due process procedures is a central issue in any ensuing litigation. Both the federal Constitution and state statutes grant teachers procedural protection. Consequently, school officials must be familiar with due process principles and apply them in rendering adverse employment decisions.

"Nonrenewal" is the release of a probationary or nontenured teacher at the end of the contract period; generally, it requires only notice that the teacher will not be reappointed. "Dismissal," the termination of a tenured teacher or of a nontenured teacher within the contract period, necessitates full procedural protection because both tenure statutes and employment contracts establish a property interest. Due process is required only if a teacher is able to establish a protected property or liberty interest, as guaranteed by the Fourteenth Amendment (no state shall "deprive any person of life, liberty, or property without due process of law")

After discussing when due process procedures are required, Cambron-McCabe analyzes the elements of procedural due process, including notice of charges, timeliness of notice, right to a hearing, the impartiality of the school board, evidence, findings and decisions, and posttermination hearings.

Next she discusses the remedies available to teachers whose due process rights have been violated. For example, they may seek compensatory and punitive damages, reinstatement, and payment of attorney's fees. Finally, Cambron-McCabe provides ten guidelines to assist school officials in the development of due process procedures that satisfy the requirements of the law. For example, item 10 states that "full procedural rights in a dismissal hearing must include representation by counsel, presentation of evidence and witnesses, examination and cross-examination of witnesses, report of findings of facts, decision based on evidence, and a record of the proceeding."

5 **Citron, Christaine H.** "An Overview of Legal Issues in Teacher Quality." *Journal of Law and Education*, 14, 3 (July 1985), pp. 277-307. EJ 327 901.

As states develop reform strategies to improve teacher quality, "two constitutional mandates, the one prohibiting discrimination and the other requiring fairness of procedures," must be taken into account by policy-makers. In this wide-ranging essay Citron, an attorney specializing in education law, identifies the central legal principles that must guide policy-makers if they are to avoid legal pitfalls.

Concerning the entry of new teachers, Citron discusses certification, accreditation of teacher education programs, and the controversial issue of teacher testing. In discussing teachers' performance, Citron addresses legal issues related to tenure laws, teacher evaluation, changing employment requirements (tenure and certification), collective bargaining, equity considerations, and the interrelationship of tenure and labor laws. Noting the "widespread perception" that tenured teachers are not rigorously evaluated, she points out that tenure itself is a product of legislation. Hence, "there is no legal obstacle preventing states from strengthening the evaluation component of tenure."

Finally, Citron reviews the legal issues related to dismissal, offering discussions of incompetence, reduction in force, the legal limits of academic freedom, and procedural requirements. She concludes that if the legal principles discussed in her essay are considered in the policy-making process, then "the law" need not impede reform that aims to improve teacher quality.

6 **Gross, James A., and Knight, Thomas R.** *Public Policy and the Arbitration of Tenure Decisions*. Final Report. Ithaca, NY: School of Industrial and Labor Relations, Cornell University, September 1981. 67 pages. ED 208 568.

Who makes the decision to grant tenure to teachers? In 1976, the New York State Court of Appeals ruled that the state's Education Law forbids school boards from relinquishing their authority and responsibility to make tenure decisions. The court assumed, say Gross and Knight, "that local boards do in fact make tenure decisions rather than accept judgments made by school administrators directly responsible for supervising probationary teachers."

To test the validity of the court's assumption, the researchers surveyed 2,600 board members, superintendents, principals, and teachers in 83 New York districts. To obtain additional information about the tenure decision process, they also interviewed at length a handful of board members and administrators.

In reality, the researchers found, principals and superintendents are the final decision-makers. It is they who evaluate and recommend teachers for tenure—primarily during teachers' first two probationary years. School boards rarely if ever contravene the superintendent's recommendations. "While the final authority on tenure decisions is formally vested in school boards," conclude Gross and Knight, "that authority is in fact delegated by school boards to the professional educators who administer the schools." School boards confine their involvement in tenure decisions to expressions of policy.

Teachers who were surveyed reported "mixed sentiments about the rationality of the review process and the criteria upon which tenure decisions are actually made." Nevertheless, they "tend to believe that their supervisors have a reasonably accurate idea of the quality of their teaching." Teacher unions "rarely, if ever, challenge the substantive basis for tenure denials." Accordingly, most teachers who are not granted tenure resign about two-thirds of the way through their probationary periods.

Would the public interest be served by having a third party, such as a tenured college professor, serve as arbiter over tenure decisions made by school administrators? Gross and Knight conclude that "such arbital authority would serve little practical purpose since neither the survey results nor interviews revealed any significant evidence of substantial controversy over tenure-granting decisions."

7 **Larson, David H**. "Dismissing Incompetent Staff." *School Administrator*, 40,2 (February 1983), pp. 28, 35, 37. EJ 276 318.

When the law and proper procedures are followed, there is no sound basis for the all too common belief that it is "nearly impossible" to dismiss an incompetent teacher. Tenure laws derive from, and are also subordinate to, the fundamental mission of providing a better education for children. The concept of dismissal for "good cause" is inherent or explicitly expressed in the tenure and continuing contract statutes of every state.

What constitutes "good cause"? Among other legitimate reasons to dismiss a teacher, Larson discusses incompetence, insubordination, immorality, disability, and elimination of the position. He offers explanations and examples of each type of dismissal, focusing particularly on incompetence, the most common ground used by school boards to dismiss teachers.

Even when school boards have "good cause" for dismissal, they sometimes have lost in court because of failure to follow proper procedures or to provide adequate documentation. Larson furnishes an eleven-point checklist evaluators should use when a teacher has been placed on an intensive evaluation program. "The bottom line is to help the teacher get better or to help the teacher get out." When fair evaluation processes and legal procedures are carefully followed, the burden of proving "good cause" should not be a deterrent for the dismissal of an unacceptable teacher.

8 **MacDonald, W. Bruce**. "What Your Board Should Do When Administrators Ask for a Hearing to Dismiss a Tenured Teacher." *American School Board Journal*, 170, 5 (May 1983), pp. 26-27. EJ 280 898.

"Conducting a school board hearing on a teacher's incompetency is an intricate legal dance in which certain steps must be followed carefully," advises MacDonald. Past president of a Massachusetts school board, MacDonald outlines the important actions that the board president must take prior to and during the hearing. Enlightened decision-making "based on correct procedure and sensitivity" to the due process system is ultimately the responsibility of the board president, he says. Nevertheless, all board members must "understand the depth of attention that must be paid to the spirit and letter of due process."

MacDonald stresses the importance of initial preparations which determine whether the hearing goes smoothly and productively. The role of the board president is to guarantee a thoughtful and balanced approach at the hearing.

Before the hearing, the president explains to the board what it can and cannot do and say in advance of the hearing. It must be made especially clear that the board is legally obligated to refrain from all discussion of the substance of the charges against the teacher. "Communication with counsel is allowed only on procedural questions and should be handled solely by the president."

Guidelines for conducting the hearing should include the following rules: First, "the board is present to hear evidence, not to engage in debate." Second, "the hearing will begin with a presentation of evidence from the administration, followed by a presentation of evidence from the teacher (or counsel)." Third, "as the hearing proceeds, either side may ask questions to seek clarification of fact or meaning." Finally, "the role of the board is to hear the evidence presented by both sides, evaluate it, and decide whether the charges are substantiated."

9 **Phay, Robert E**. "Teacher Renewal: What Constitutes Arbitrary and Capricious Action?" *School Law Bulletin*, 15,3 (July 1984), pp. 1, 10-17. EJ 304 088.

Phay, editor of the *School Law Bulletin*, stresses that a school board has a legal and moral responsibility to employ only the best teachers that it can recruit. What if, in searching for the best teachers, a board chooses not to reappoint an "average" or "satisfactory" probationary teacher because it believes that a better teacher can be found? The board is free to do so, advises Phay, provided that it acts in good faith to improve its educational programs.

A probationary teacher who alleges that a nonreappointment decision was based on "an impermissible reason" has the burden of initiating a hearing and proving the allegation. "If the school has a procedure for internal review, the employee must request this review before he may seek judicial review." However, school boards are subject to few restraints in exercising their powers to appoint and reappoint only the best teachers. A board can refute an allegation that a nonreappointment was arbitrary by showing any plausible educationally related basis for the nonrenewal decision. Courts have usually upheld nonrenewals.

Phay points to several reasons a court may decide nonrenewal of a teacher was "arbitrary or capricious": The board acted in bad faith; the board based its action on the teacher's exercise of First Amendment or other constitutionally protected rights; its decision was "unrelated to the educational process or to a reasonable educational objective" or was "justified by reasons that are wholly unsupported in fact"; or the board took the action for "frivolous or trivial" reasons or in some way abused its discretion.

Phay's review of court decisions leads him to conclude that if the school board proceeds in a deliberate manner, considers all available evidence, and acts fairly on the basis of that evidence, its decisions will stand.

10 **Phay, Robert E**. "Nonreappointment of Teachers: A Proposed Board Policy." *School Law Bulletin*, 12,2 (April 1981), pp. 1, 10-16. EJ 245 705.

This proposed nonreappointment policy may be used by a

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school board as a guide in drafting its own policy on the termination of nontenured professional staff. The code is composed of nine sections, each accompanied by comments that clarify their intent. The code covers permissible and impermissible grounds for nonreappointment, notice of nonrenewal, teacher's request for a conference, conference, teacher's request to appear before the board, board action on teacher request, conduct of the hearing, hearing procedure, and procedure after the hearing.

Phay describes his basic approach to appointment and nonreappointment and discusses the requirements of the law. The law requires that the board give an explanation for its nonreappointment decision and give the probationary teacher a hearing only if the teacher can establish a *prima facie* case that he or she has been terminated for a constitutionally impermissible reason or has been stigmatized by the way in which the nonreappointment was handled. The U.S. Supreme Court made it clear in *Roth v. Board of Regents*, says Phay, "that a public employer may choose not to give an employee a new contract—i.e., not reappoint the employee to a new term—for any reason not based on the employee's exercise of constitutional rights or his race, religion, sex, or national origin." Nevertheless, he advises boards to adopt a limited review procedure "that includes a conference and a board hearing in certain circumstances even when none is required."

Only when high standards are adhered to in the selection of teachers will students be assured of the best learning opportunities. The responsibility of the school board is to find the best teachers available. The probationary teacher who does not appear to have the potential for excellence should be culled as soon as possible. Thus, Phay suggests that "most nonreappointment actions should be taken in the first rather than the third year of employment."

11 **Zirkel, Perry A.** "The Law on Reduction in Force: An Overview and Update." In Beckham, Joseph, and Zirkel, Perry A., eds. *Legal Issues in Public School Employment*. Bloomington, IN: Phi Delta Kappa, 1983. Pp. 171-195. ED 245 380.

Zirkel explains that state statutes are the primary source of the law concerning reduction in force, though nonstatutory reasons for RIF are sometimes specified in local collective bargaining agreements. The most common statutory ground for the loss of positions by public school teachers for nonpersonal reasons (in contrast to such personal reasons as incompetency, immorality, or insubordination) is enrollment decline. Other grounds are fiscal or budgetary constraints, reorganization or consolidation of school districts, reduction in the number of teaching positions, curricular changes, and other "good and just" causes.

Courts have made it clear, warns Zirkel, that they will not tolerate school boards' unscrupulous use of RIF as a fictitious pretext for the dismissal of teachers on other grounds. However, proving such a pretext is not an easy matter: "Courts tend not to probe aggressively for underlying impermissible motives if there seems to be sufficient evidence supporting the stated permissible reasons."

Only a minority of state statutes specify criteria that establish the order of RIF. Where such criteria are specified, tenure status and seniority predominate. Merit is given a relatively limited role. Where a state's statutes do not specify the order of RIF between tenured and nontenured teachers and disputes have arisen, "the overwhelming majority of courts have accorded tenured teachers a priority," Zirkel states. Some local districts have sought to make up for the absence of statutes by enacting their own policies. Zirkel advises that "exceptions to the overall trend favoring tenured teachers must be clearly specified and applied."

Lacking statutory guidance, courts have also tended to favor a seniority standard in determining the order of layoff, but not to the degree they have favored tenure, Zirkel finds. When faculties must be reduced, some teachers have "bumping" rights depending on their tenure status, seniority, and other factors specified in statutes or board policies. Courts have ruled that such bumping rights are limited by the teachers' legal qualifications (such as certification), the need for faculty sex balance, and affirmative action requirements.

On the whole, says Zirkel, "courts have tended not to interpret statutory and constitutional procedural due process protections expansively" in relation to RIF plaintiff teachers.

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